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No. 85-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

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WILLIAM "BILLY" MITCHELL,

Petitioner,

- Against -

RALPH KEMP, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

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ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

# PETITIONER'S REPLY BRIEF

JOHN C. BOGER
JAMES S. LIEBMAN
99 Hudson Street
New York, New York 10013

ROBERT WEISBERG
Stanford Law School
Stanford, California 94305

*MICHAEL L. RUGEN
CHRISTOPHER M. PATTI
HELLER, EHRMAN, WHITE & McAULLIFFE
44 Montgomery Street
San Francisco, California 94104
(415) 772-6000

ROBERT T. FRIES
ANDREW W. CHAR
STEINHART & FALCONER
333 Market Street
San Francisco, California 94105
(415) 777-3999

Attorneys for Petitioner
William "Billy" Mitchell

* Counsel of Record

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## DISCUSSION

Petitioner William "Billy" Mitchell submits this reply brief in further support of his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

### I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A CAPITAL DEFENDANT IS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY, WITHOUT JUSTIFICATION, FAILS TO INVESTIGATE OR PRESENT AT HIS SENTENCING TRIAL ANY OF THE POWERFUL MITIGATION EVIDENCE THAT WAS READILY AVAILABLE.

Notwithstanding its efforts to alchemize the representation afforded Petitioner from chimera to substance, Respondent cannot deny several basic facts. These facts plainly demonstrate Peitioner's right to relief.

First, mitigation evidence of a quality and quantity rarely, if ever, encountered in capital cases was readily available to Petitioner's trial counsel. Petition at 2-10. Second, none of this powerful mitigation evidence was presented to the sentencer; indeed, counsel presented no evidence whatever at the sentencing trial. Petition at 3. Third, as the Court of Appeals determined, counsel engaged in virtually no preparation for the sentencing trial nor did he attempt to obtain any of this easily available mitigation evidence. Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985). Fourth, introduction of mitigation evidence at the sentencing trial was Petitioner's only plausible defense. Fifth, Petitioner's trial counsel had no reasonable strategy justifying his failure to investigate or present mitigation evidence.[1]

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1 The "strategic" justification urged by Respondent and the Court of Appeals -- counsel's fear that introduction of mitigating evidence would provoke the state to introduce Petitioner's prior conviction which counsel thought might overwhelm his mitigation case -- is patently unreasonable. First, counsel was admittedly unaware of, and did not investigate, the nature of the prior conviction (which was for attempted robbery and for which Petitioner received the minimum six-month sentence (R-IV at 779)); nor did he investigate potential mitigating evidence. Thus he had no basis on which to weigh the strength of the potential

(footnote continued)

Petition at 17-24.

Unable to dispute these facts, Respondent clouds the issue by exhaustively and repetitively cataloguing those few preparations counsel did undertake.[2] But all of the pretrial preparations Respondent cites were directed to the guilt phase, not the sentencing phase, of Petitioner's trial. Respondent admits that counsel's only sentencing preparation consisted of an interview with his client during the brief recess between the guilty plea and the sentencing hearing.[3] This Court's decisions in Strickland v. Washington, __ U.S. __, 80 L.Ed.2d 674 (1984); Eddings v. Oklahoma, 455 U.S. 104 (1982); and Lockett v. Ohio, 438 U.S. 586 (1978), clearly require more.

Respondent also urges that Mr. Miller's failure to present a sentencing phase defense was excusable because he felt that evidence of guilt was "overwhelming." Opposition Brief at 7.

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mitigation testimony against the prior conviction. Second, counsel voluntarily informed the sentencing judge of his client's prior conviction at the outset of the sentencing hearing. Third, the existence of potentially damaging evidence never justifies abdication of counsel's responsibility to investigate mitigation evidence; on the contrary, it imposes on counsel a heightened duty to investigate and present counterveiling evidence in mitigation. Petition at 17-24.

2 Nevertheless, Respondent cannot dispute that counsel's "preparations" were limited to these: four or five "interviews" with Petitioner, one of which was at a line-up and another of which occurred during the short break between the guilt and sentencing trials; examination of the state's evidence; interviews of some, but not all, the state's witnesses (one uninterviewed witness being the sole eyewitness to the crime). Petition at 2-3.

3 Respondent's Brief in opposition to this Petition states at page 10:

> Contrary to Petitioner's assertions in the Petition for a Writ of Certiorari, Mr. Miller did plan for the sentencing hearing. Petitioner entered his guilty plea on November 5, 1974; the court was recessed until 2:00 p.m. at which time the sentencing phase was scheduled to begin. Mr. Miller stated that he spent a substantial amount of the interval between the guilty plea and the sentencing hearing in converstaion with the Petitioner.

Opposition Brief at 10.

But this argument stands the right to sentencing phase counsel on its head. If counsel believed that conviction was likely, he should have known that a vigorous sentencing defense offered the only meaningful chance of saving his client's life. Reasonably effective counsel can never decide to forego his client's only viable defense. Mr. Miller's perception of the evidence of guilt as "overwhelming" renders his failure to prepare a sentencing defense more, not less, egregious.

Respondent next argues that counsel's inaction was justified because, according to Mr. Miller, Petitioner expressed a desire that his family not be involved. Assuming Petitioner made such a request,[4] Mr. Miller failed to undertake the type of independent factual investigation and client counselling necessary to justify counsel foregoing a sentencing phase defense and thereby throwing away his client's only hope of avoiding a death sentence. Respondent admits that counsel "was unsure as to what motivated Petitioner to discourage him in this way" and that Miller "did not probe deeply into Mitchell's reasons for not wishing to involve his family." Opposition Brief at 11; See Mitchell v. Kemp, 762 F.2d at 890. Because Mr. Miller did not investigate mitigation evidence and did not explain the dire implications of not presenting such evidence,[5] he deprived Petitioner of the opportunity to make an

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4 Mr. Miller's own testimony raises significant questions about the scope of the supposed "request" and the seriousness with which Mr. Miller took it. As Respondent admits, notwithstanding Petitioner's statements, counsel twice contacted Petitioner's father. Opposition Brief at 11. Yet he used those opportunities, not to explore potential mitigating testimony, but to discuss possible fee arrangements. Mr. Miller's testimony strongly suggests that he did not consider Petitioner's "requests" binding at the time but that he raised them only after the fact to rationalize his gross inaction. (R-V at 26.)

5 Respondent's statement that counsel "had been instructed by Petitioner not to call family members on the question of mitigation", Opposition Brief at 10, creates the false impression that counsel discussed with Petitioner the possibility of presenting mitigation evidence. There is no support in the record for such a conclusion. Rather, under the most generous view of his testimony, Mr. Miller appears to
(footnote continued)

informed decision regarding his defense. By passively acquiescing to Petitioner's uninformed wishes,[6] Mr. Miller totally abdicated his responsibility as an attorney and denied Petitioner the effective assistance of counsel guaranteed by the United States Constitution. See Strickland v. Washington, ___ U.S. at ___, 80 L.Ed.2d at 694; Gaines v. Hopper, 525 F.2d 1147 (5th Cir. 1978); People v. Mozingo, 34 Cal.3d 926, 671 P.2d 52, 196 Cal.Rptr. 348 (1983).

This case presents in the starkest terms the issue the Court was not required to reach in Strickland v. Washington, supra: is a capital defendant denied his Sixth Amendment right to effective assistance of counsel when his attorney fails, without justification, to present to the sentencer any of the extraordinary mitigation evidence that is available? In two recent cases, Smith v. Sielaff, No. 85-5487, cert. granted 54 U.S.L.W. 3262 (October 21, 1985), and Darden v. Wainwright, No. 85-5319, cert. granted 54 U.S.L.W. 3169 (September 3, 1985), this Court has granted certiorari in part to address this issue and to refine the standards set forth in Washington. Petitioner respectfully submits that the Court should grant the Petition in this case for the same reasons.

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(footnote continued from previous page)
have passively accepted Petitioner's supposedly expressed reluctance to involve his family as absolving counsel of responsibility for investigating mitigation evidence or counseling his client on the subject.

6 Counsel's passivity in this regard typified his representation of Petitioner. For example, Respondent quotes Mr. Mitchell's testimony: "Other than to give him an opinion on what I thought to be a knowledge of certain laws, his rationalization, his awareness, his cause and effect, I considered equal to my own." Opposition Brief at 8. Mr. Miller testified that he "tried to be guided by what a large extent Mr. Mitchell himself wanted to do." Opposition Brief at 9. See also Petition at 16-17 & n. 6.

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH SENTENCE MAY REST, EVEN IN PART, ON AN UNCONSTITUTIONALLY COERCED CONFESSION.

Petitioner contends that the district court erred in failing to grant an evidentiary hearing on his claim that his confession, which was introduced during the sentencing trial as evidence of aggravation, was coerced unconstitutionally. The Court of Appeals rejected Petitioner's contention on the ground that the state produced sufficient evidence of aggravating factors apart from the confession. The Court of Appeals' opinion is in clear contradiction of this Court's holding in Zant v. Stephens, 462 U.S. 862, 885, 887 n.23 (1983). This Court has recently granted certiorari to determine this identical issue in Smith v. Sielaff, supra. Accordingly, Petitioner respectfully submits that the Court should also grant this Petition for a Writ of Certiorari to clarify the proposition of Zant v. Stephens that a death sentence may not rest, even in part, on an unconstitutionally coerced confession.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE GEORGIA DEATH PENALTY STATUTE IS APPLIED IN A RACIALLY DISCRIMINATORY MANNER, IN VIOLATION OF THE EIGHTH AMENDMENT.

The reasons that the Court should grant certiorari to determine this issue are set forth in the Petition for Writ of Certiorari.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: December 4, 1985

Respectfully submitted,

JOHN C. BOGER
JAMES S. LIEBMAN
99 Hudson Street
New York, New York 10013

ROBERT WEISBERG
Stanford Law School
Stanford, California 94305

*MICHAEL L. RUGEN
CHRISTOPHER M. PATTI
HELLER, EHRMAN, WHITE & McAULLIFFE
44 Montgomery Street
San Francisco, California 94104
(415) 772-6000

ROBERT T. FRIES
ANDREW W. CHAR
STEINHART & FALCONER
333 Market Street
San Francisco, California 94105
(415) 777-3999

Attorneys for Petitioner
William "Billy" Mitchell

By _____
MICHAEL L. RUGEN

AFFIDAVIT OF SERVICE

MICHAEL L. RUGEN, being duly sworn, deposes and says:

1. I am a member of the firm of Heller, Ehrman, White & McAuliffe, 44 Montgomery Street, San Francisco, California and a member of the Bar of this Court.

2. On December 4, 1985, I caused copies of the attached Petitioner's Reply Brief to be deposited in a mailbox of the United States Postal Service, with first-class postage prepaid, addressed to as follows:

Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington D.C. 20543

Clerk of the Court
United States Court of Appeals
Eleventh Circuit
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capital Square, S.W.
Atlanta, Georgia 30334

MICHAEL L. RUGEN

Sworn to before me this
4th day of December, 1985.

Patricia Goldsworthy
Notary Public

PATRICIA GOLDSWORTHY
NOTARY PUBLIC-CALIFORNIA
CITY & COUNTY OF
SAN FRANCISCO